

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 4, 2001 appellant, then a 56-year-old data entry technician, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2001 he twisted his right knee when his knee caught on a black residue under his desk as he rose from his chair while in the performance of duty. He stopped work on August 29, 2001. OWCP accepted the claim for right knee strain and right knee medial meniscus tear. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls as of July 14, 2002.

By letter dated July 31, 2002, OWCP explained appellant's entitlement to compensation benefits. In an accompanying EN1049 form, it advised him, that, since he was covered under the Federal Employees Retirement System (FERS), it would have to deduct at least part of his SSA retirement benefit to which he would be entitled based on age, explaining that a portion of a FERS benefit was included in SSA retirement benefits. Appellant was, therefore, advised to notify OWCP immediately after filing for or receiving SSA retirement benefits.

On December 26, 2017 SSA forwarded a completed FERS/SSA dual benefits calculation form to OWCP, noting appellant's SSA age-related retirement benefit rates with and without FERS. It noted that appellant began receiving retirement benefits effective September 2010.

In a FERS offset overpayment calculation form dated May 21, 2018 OWCP documented its calculation of the total overpayment in the amount of \$69,177.66 for the period September 1, 2010 until April 28, 2018.

On June 28, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$69,177.66 had been created. It explained that the overpayment occurred because a portion of appellant's SSA benefits that he received from September 1, 2010 through April 28, 2018 was based on credits earned while working for the Federal Government, and this portion of his SSA was a prohibited dual benefit. OWCP found him at fault in the creation of the overpayment as he had not reported receipt of SSA retirement benefits on his EN1032 forms. It informed him of his review rights, *via* an overpayment action request form, and instructed him to complete an enclosed overpayment recovery questionnaire Form OWCP-20 and submit supporting documentation including copies of tax returns, bank account statements, bills and cancelled checks, pay slips, and other records which supported the income and expenses listed. OWCP allotted 30 days for him to respond.

On a July 2, 2018 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He contested OWCP's findings regarding the fact and amount of overpayment, and requested waiver of recovery of the overpayment.

² Docket No. 19-0334 (issued August 7, 2020).

On a Form OWCP-20 dated October 10, 2018, appellant noted total monthly income of \$4,312.22 and total monthly expenses of \$3,547.61, with assets of \$795.00. He attached financial information to substantiate his expenses.

A prerecoupment hearing was held on October 10, 2018. By decision dated November 14, 2018, the OWCP hearing representative finalized the preliminary determination, finding that an overpayment of compensation in the amount of \$69,177.66 occurred for the period September 1, 2010 through April 28, 2018 because appellant received FECA benefits and benefits from SSA without the appropriate offset.³ She further found he was at fault in the creation of the overpayment because he failed to report his SSA retirement benefits and that recovery of the overpayment, therefore, could not be waived. The hearing representative found that recovery of the overpayment would be made by deducting \$500.00 every 28 days from appellant's continuing FECA compensation payments.

Appellant appealed the November 14, 2018 decision to the Board on November 30, 2018. By decision dated August 7, 2020,⁴ the Board affirmed in part and set aside in part the November 14, 2018 decision. The Board found that OWCP properly determined that an overpayment in the amount of \$69,177.66 had been created because appellant concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period September 1, 2010 through April 28, 2018. The Board determined, however, that appellant was without fault in the creation of the overpayment of compensation. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment.

On remand from the Board's decision, OWCP provided appellant with another Form OWCP-20 for his completion, noting that updated financial information was needed for consideration of waiver of recovery of the overpayment.

In a letter dated February 8, 2021, OWCP's hearing representative informed appellant that an oral hearing would be held pursuant to the Board's remand instructions to consider waiver of recovery of the overpayment. She requested he complete an updated Form OWCP-20 and provide supporting financial documentation. Appellant was informed that under 20 C.F.R. § 10.438 the failure to submit the requested financial information would result in denial of waiver of the overpayment.

On a Form OWCP-20 dated March 1, 2021, appellant noted monthly income of \$2,760.00 from SSA and \$144.14 from other benefits, for a total monthly income, without FECA benefits, of \$2,904.14. He listed monthly expenses of \$3,490.00, which included \$860.00 for rent, \$500.00 for food, \$100.00 for clothing, \$605.00 for utilities, and \$225.00 for miscellaneous expenses, he also noted \$1,000 in monthly installment payments to a credit union, and \$200.00 in monthly installment payments to a bank. He listed assets of \$4,687.90. He attached numerous financial documents to substantiate his expenses.

³ The Board notes that the hearing representative incorrectly identified the period of the overpayment as from September 1, 2010 through December 1, 2017.

⁴ *Supra* note 2.

A hearing before an OWCP hearing representative was held on March 10, 2021.

By decision June 1, 2021, OWCP's hearing representative found that, based on the evidence appellant submitted regarding his income and expenses, his total monthly income was \$4,510.54 and his ordinary and necessary living expenses did not exceed \$3,886.99. She determined that recovery of the overpayment would not defeat the purpose of FECA as his monthly income exceeded his monthly expenses by more than \$50.00. The hearing representative further found that there was no evidence that appellant relinquished a valuable right in reliance on the additional compensation or changed his position for the worse in reliance on the erroneous compensation payment such that recovery would be inequitable or against good conscience. The hearing representative related that recovery of the overpayment would be made by deduction of \$400.00 every 28 days from appellant's continuing FECA compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8129 of FECA⁵ provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁶

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁷ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.⁸

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such

⁵ *Supra* note 1.

⁶ *J.T.*, Docket No. 21-0010 (issued September 30, 2021); *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

⁷ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide those assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) and (3) (September 2020).

⁸ *Id.* at Chapter 6.400.4b(3)(a), (b).

payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

The Board notes that after it remanded the case to OWCP for consideration of waiver, OWCP provided appellant with another Form OWCP-20 to complete with updated financial information. A prerecoupment hearing was held on March 10, 2021.

As appellant was found to be without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The hearing representative noted that the financial documentation appellant submitted prior to the hearing represented his current monthly income and expenses. OWCP considered appellant's updated financial information, as reported on appellant's Form OWCP 20, to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

The evidence of record establishes that appellant has monthly income totaling \$4,510.54 and average monthly necessary expenses totaling \$3,886.99. Appellant's monthly income, therefore, exceeds his monthly expenses by \$623.55. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, he has not established that he needs substantially all of his income for ordinary and necessary living expenses.¹⁰

Appellant also has not established that recovery of the overpayment would be against equity and good conscience. He has not submitted evidence that he would experience severe financial hardship in attempting to repay the debt, or that in reliance on the overpayment he gave up a valuable right or changed his position for the worse.¹¹ Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 2

Section 10.441 of OWCP's regulations provides in pertinent part: "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation,

⁹ 20 C.F.R. § 10.437(b)(1).

¹⁰ See *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹¹ *J.T.*, *supra* note 6; *L.D.*, Docket No. 18-1317 (issued August 17, 2019); *William J. Murphy*, 41 ECAB 569 (1989).

taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly requested recovery of the overpayment by deducting \$400.00 every 28 days from appellant’s continuing compensation.

In determining whether appellant could repay the overpayment through \$400.00 deductions from continuing compensation, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method would minimize resulting hardship. The Board finds that OWCP gave due regard to the financial information provided, noting that appellant was not deemed to need substantially all of his monthly income to meet current and ordinary living expenses as monthly income exceeds monthly expenses by \$623.55. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant’s compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board also finds that OWCP properly required repayment of the overpayment by deduction of \$400.00 every 28 days from his continuing compensation payments.

¹² 20 C.F.R. § 10.441(a); *J.T.*, *supra* note 6; *A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board